

OCA FILE LEG

14 October 1988

OCA 3451-88

MEMORANDUM FOR: Chief, Administrative Law Division/OGC

FROM: Legislation Division
Office of Congressional Affairs

SUBJECT: Berne Convention Implementation Act of 1988,
S. 1301 and H.R. 4262

1. Attached for your information is a copy of the above-captioned bill. It has been passed by both houses of Congress and has been sent to the President for signature.

2. If you have any questions, please telephone me on

Attachment

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LEGI-SLATE Report for the 100th Congress Tue, October 18, 1988 8:58am (EDT)

Report for H.R.4262 Berne Convention Implementation Act of 1988

As finally approved by the House and Senate (Enrolled), AT THE SECOND
SESSION

Complete Text of this version

H.R.4262

One Hundredth Congress of the United States of America
AT THE SECOND SESSION

Begun and held at the City of Washington on Monday,
the twenty-fifth day of January, one thousand nine hundred and eighty-eight

An Act

To amend title 17, United States Code, to implement the Berne Convention
for the Protection of Literary and Artistic Works, as revised at Paris on July
24, 1971, and for other purposes.

=====

Be it enacted by the Senate and House of Representatives of the United
States of America in Congress assembled,

SECTION 1. SHORT TITLE AND REFERENCES TO TITLE 17,
UNITED STATES CODE.

(a) Short Title.--This Act may be cited as the "Berne Convention
Implementation Act of 1988".

(b) References to Title 17, United States Code.--Whenever in this Act an
amendment or repeal is expressed in terms of an amendment to or a repeal of a
section or other provision, the reference shall be considered to be made to a
section or other provision of title 17, United States Code.

SEC. 2. DECLARATIONS.

The Congress makes the following declarations:

(1) The Convention for the Protection of Literary and Artistic Works,
signed at Berne, Switzerland, on September 9, 1886, and all acts,
protocols, and revisions thereto (hereafter in this Act referred to as the
"Berne Convention") are not self-executing under the Constitution and laws
of the United States.

(2) The obligations of the United States under the Berne Convention may
be performed only pursuant to appropriate domestic law.

(3) The amendments made by this Act, together with the law as it exists
on the date of the enactment of this Act, satisfy the obligations of the
United States in adhering to the Berne Convention and no further rights or
interests shall be recognized or created for that purpose.

SEC. 3. CONSTRUCTION OF THE BERNE CONVENTION.

(a) Relationship With Domestic Law.--The provisions of the Berne Convention--

(1) shall be given effect under title 17, as amended by this Act, and any other relevant provision of Federal or State law, including the common law; and

(2) shall not be enforceable in any action brought pursuant to the provisions of the Berne Convention itself.

(b) Certain Rights Not Affected.--The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law--

(1) to claim authorship of the work; or

(2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation.

SEC. 4. SUBJECT MATTER AND SCOPE OF COPYRIGHTS.

(a) Subject and Scope.--Chapter 1 is amended--

(1) in section 101--

(A) in the definition of "Pictorial, graphic, and sculptural works" by striking out in the first sentence "technical drawings, diagrams, and models" and inserting in lieu thereof "diagrams, models, and technical drawings, including architectural plans";

(B) by inserting after the definition of "Audiovisual works", the following:

"The 'Berne Convention' is the Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto.

"A work is a 'Berne Convention work' if--

"(1) in the case of an unpublished work, one or more of the authors is a national of a nation adhering to the Berne Convention, or in the case of a published work, one or more of the authors is a national of a nation adhering to the Berne Convention on the date of first publication;

"(2) the work was first published in a nation adhering to the Berne Convention, or was simultaneously first published in a nation adhering to the Berne Convention and in a foreign nation that does not adhere to the Berne Convention;

"(3) in the case of an audiovisual work--

"(A) if one or more of the authors is a legal entity, that author has its headquarters in a nation adhering to the Berne Convention; or

"(B) if one or more of the authors is an individual, that author is domiciled, or has his or her habitual residence in, a nation adhering to the Berne Convention; or

"(4) in the case of a pictorial, graphic, or sculptural work that is incorporated in a building or other structure, the building or structure is located in a nation adhering to the Berne Convention.

For purposes of paragraph (1), an author who is domiciled in or has his or her habitual residence in, a nation adhering to the Berne Convention is considered to be a national of that nation. For purposes of paragraph (2), a work is considered to have been simultaneously published in two or more nations if its dates of publication are within 30 days of one another."; and

(C) by inserting after the definition of "Copyright owner", the following:

"The 'country of origin' of a Berne Convention work, for purposes of section

411, is the United States if--

"(1) in the case of a published work, the work is first published--

"(A) in the United States;

"(B) simultaneously in the United States and another nation or nations adhering to the Berne Convention, whose law grants a term of copyright protection that is the same as or longer than the term provided in the United States;

"(C) simultaneously in the United States and a foreign nation that does not adhere to the Berne Convention; or

"(D) in a foreign nation that does not adhere to the Berne Convention, and all of the authors of the work are nationals, domiciliaries, or habitual residents of, or in the case of an audiovisual work legal entities with headquarters in, the United States;

"(2) in the case of an unpublished work, all the authors of the work are nationals, domiciliaries, or habitual residents of the United States, or, in the case of an unpublished audiovisual work, all the authors are legal entities with headquarters in the United States; or

"(3) in the case of a pictorial, graphic, or sculptural work incorporated in a building or structure, the building or structure is located in the United States.

For the purposes of section 411, the 'country of origin' of any other Berne Convention work is not the United States.";

(2) in section 104(b)--

(A) by redesignating paragraph (4) as paragraph (5); and

(B) by inserting after paragraph (3) the following new paragraph:

"(4) the work is a Berne Convention work; or";

(3) in section 104 by adding at the end thereof the following:

"(c) Effect of Berne Convention.--No right or interest in a work eligible for protection under this title may be claimed by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto. Any rights in a work eligible for protection under this title that derive from this title, other Federal or State statutes, or the common law, shall not be expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto."; and

(4) by inserting after section 116 the following new section:

"Sec. 116A. Negotiated licenses for public performances by means of coin-operated phonorecord players

"(a) Applicability of Section.--This section applies to any nondramatic musical work embodied in a phonorecord.

"(b) Limitation on Exclusive Right if Licenses Not Negotiated.--

"(1) Applicability.--In the case of a work to which this section applies, the exclusive right under clause (4) of section 106 to perform the work publicly by means of a coin-operated phonorecord player is limited by section 116 to the extent provided in this section.

"(2) Determination by copyright royalty tribunal.--The Copyright Royalty Tribunal, at the end of the 1-year period beginning on the effective date of the Berne Convention Implementation Act of 1988, and periodically thereafter to the extent necessary to carry out subsection (f), shall determine whether or not negotiated licenses authorized by subsection (c) are in effect so as to provide permission to use a quantity of musical works not substantially smaller than the quantity of such works performed on coin-operated phonorecord players during the 1-year period ending on the effective date of that Act. If the Copyright Royalty Tribunal

determines that such negotiated licenses are not so in effect, the Tribunal shall, upon making the determination, publish the determination in the Federal Register. Upon such publication, section 116 shall apply with respect to musical works that are not the subject of such negotiated licenses.

"(c) Negotiated Licenses.--

"(1) Authority for negotiations.--Any owners of copyright in works to which this section applies and any operators of coin-operated phonorecord players may negotiate and agree upon the terms and rates of royalty payments for the performance of such works and the proportionate division of fees paid among copyright owners, and may designate common agents to negotiate, agree to, pay, or receive such royalty payments.

"(2) Arbitration.--Parties to such a negotiation, within such time as may be specified by the Copyright Royalty Tribunal by regulation, may determine the result of the negotiation by arbitration. Such arbitration shall be governed by the provisions of title 9, to the extent such title is not inconsistent with this section. The parties shall give notice to the Copyright Royalty Tribunal of any determination reached by arbitration and any such determination shall, as between the parties to the arbitration, be dispositive of the issues to which it relates.

"(d) License Agreements Superior to Copyright Royalty Tribunal Determinations.--License agreements between one or more copyright owners and one or more operators of coin-operated phonorecord players, which are negotiated in accordance with subsection (c), shall be given effect in lieu of any otherwise applicable determination by the Copyright Royalty Tribunal.

"(e) Negotiation Schedule.--Not later than 60 days after the effective date of the Berne Convention Implementation Act of 1988, if the Chairman of the Copyright Royalty Tribunal has not received notice, from copyright owners and operators of coin-operated phonorecord players referred to in subsection (c)(1), of the date and location of the first meeting between such copyright owners and such operators to commence negotiations authorized by subsection (c), the Chairman shall announce the date and location of such meeting. Such meeting may not be held more than 90 days after the effective date of such Act.

"(f) Copyright Royalty Tribunal To Suspend Various Activities.--The Copyright Royalty Tribunal shall not conduct any ratemaking activity with respect to coin-operated phonorecord players unless, at any time more than one year after the effective date of the Berne Convention Implementation Act of 1988, the negotiated licenses adopted by the parties under this section do not provide permission to use a quantity of musical works not substantially smaller than the quantity of such works performed on coin-operated phonorecord players during the one-year period ending on the effective date of such Act.

"(g) Transition Provisions; Retention of Copyright Royalty Tribunal Jurisdiction.--Until such time as licensing provisions are determined by the parties under this section, the terms of the compulsory license under section 116, with respect to the public performance of nondramatic musical works by means of coin-operated phonorecord players, which is in effect on the day before the effective date of the Berne Convention Implementation Act of 1988, shall remain in force. If a negotiated license authorized by this section comes into force so as to supersede previous determinations of the Copyright Royalty Tribunal, as provided in subsection (d), but thereafter is terminated or expires and is not replaced by another licensing agreement, then section 116 shall be effective with respect to musical works that were the subject of such terminated or expired licenses."; and

(b) Technical Amendments.--(1) Section 116 is amended--

(A) by amending the section heading to read as follows:

"Sec. 116. Scope of exclusive rights in nondramatic musical works:

Compulsory licenses for public performances by means of coin-operated phonorecord players";

(B) in subsection (a) in the matter preceding paragraph (1), by inserting after "in a phonorecord," the following: "the performance of which is subject to this section as provided in section 116A,"; and

(C) in subsection (e), by inserting "and section 116A" after "As used in this section".

(2) The table of sections at the beginning of chapter 1 is amended by striking out the item relating to section 116, and inserting in lieu thereof the following:

"116. Scope of exclusive rights in nondramatic musical works: Compulsory licenses for public performances by means of coin-operated phonorecord players.

"116A. Negotiated licenses for public performances by means of coin-operated phonorecord players.".

SEC. 5. RECORDATION.

Section 205 is amended--

(1) by striking out subsection (d); and

(2) by redesignating subsections (e) and (f) as subsections (d) and (e), respectively.

SEC. 6. PREEMPTION WITH RESPECT TO OTHER LAWS NOT AFFECTED.

Section 301 is amended by adding at the end thereof the following:

"(e) The scope of Federal preemption under this section is not affected by the adherence of the United States to the Berne Convention or the satisfaction of obligations of the United States thereunder.".

SEC. 7. NOTICE OF COPYRIGHT.

(a) Visually Perceptible Copies.--Section 401 is amended--

(1) in subsection (a), by amending the subsection heading to read as follows:

"(a) General Provisions.--";

(2) in subsection (a), by striking out "shall be placed on all" and inserting in lieu thereof "may be placed on";

(3) in subsection (b), by striking out "The notice appearing on the copies" and inserting in lieu thereof "If a notice appears on the copies, it"; and

(4) by adding at the end the following:

"(d) Evidentiary Weight of Notice.--If a notice of copyright in the form and position specified by this section appears on the published copy or copies to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages, except as provided in the last sentence of section 504(c)(2).".

(b) Phonorecords of Sound Recordings.--Section 402 is amended--

(1) in subsection (a), by amending the subsection heading to read as follows:

"(a) General Provisions.--";

(2) in subsection (a), by striking out "shall be placed on all" and inserting in lieu thereof "may be placed on";

(3) in subsection (b), by striking out "The notice appearing on the phonorecords" and inserting in lieu thereof "If a notice appears on the phonorecords, it"; and

(4) by adding at the end thereof the following new subsection:

"(d) Evidentiary Weight of Notice.--If a notice of copyright in the form and

position specified by this section appears on the published phonorecord or phonorecords to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages, except as provided in the last sentence of section 504(c)(2).".

(c) Publications Incorporating United States Government Works.--Section 403 is amended to read as follows:

"Sections 401(d) and 402(d) shall not apply to a work published in copies or phonorecords consisting predominantly of one or more works of the United States Government unless the notice of copyright appearing on the published copies or phonorecords to which a defendant in the copyright infringement suit had access includes a statement identifying, either affirmatively or negatively, those portions of the copies or phonorecords embodying any work or works protected under this title.".

(d) Notice of Copyright; Contributions to Collective Works.--Section 404 is amended--

(1) in subsection (a), by striking out "to satisfy the requirements of sections 401 through 403", and inserting in lieu thereof "to invoke the provisions of section 401(d) or 402(d), as applicable"; and

(2) in subsection (b), by striking out "Where" and inserting in lieu thereof "With respect to copies and phonorecords publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988, where".

(e) Omission of Notice.--Section 405 is amended--

(1) in subsection (a), by striking out "The omission of the copyright notice prescribed by" and inserting in lieu thereof "With respect to copies and phonorecords publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988, the omission of the copyright notice described in";

(2) in subsection (b), by striking out "omitted," in the first sentence and inserting in lieu thereof "omitted and which was publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988,"; and

(3) by amending the section heading to read as follows:

"Sec. 405. Notice of copyright: Omission of notice on certain copies and phonorecords"

(f) Error in Name or Date.--Section 406 is amended--

(1) in subsection (a) by striking out "Where" and inserting in lieu thereof "With respect to copies and phonorecords publicly distributed by authority of the copyright owner before the effective date of the Berne Convention Implementation Act of 1988, where";

(2) in subsection (b) by inserting "before the effective date of the Berne Convention Implementation Act of 1988" after "distributed";

(3) in subsection (c)--

(A) by inserting "before the effective date of the Berne Convention Implementation Act of 1988" after "publicly distributed"; and

(B) by inserting after "405" the following: "as in effect on the day before the effective date of the Berne Convention Implementation Act of 1988"; and

(4) by amending the section heading to read as follows:

"Sec. 406. Notice of copyright: Error in name or date on certain copies and phonorecords".

(g) Clerical Amendment.--The table of sections at the beginning of chapter 4 is amended by striking out the items relating to sections 405 and 406 and inserting in lieu thereof the following:

"405. Notice of copyright: Omission of notice on certain copies and phonorecords.

"406. Notice of copyright: Error in name or date on certain copies and phonorecords.".

SEC. 8. DEPOSIT OF COPIES OR PHONORECORDS FOR LIBRARY OF CONGRESS.

Section 407(a) is amended by striking out "with notice of copyright".

SEC. 9. COPYRIGHT REGISTRATION.

(a) Registration in General.--Section 408 is amended--

(1) in subsection (a), by striking out "Subject to the provisions of section 405(a), such" in the second sentence and inserting in lieu thereof "Such";

(2) in subsection (c)(2)--

(A) by striking out "all of the following conditions--" and inserting in lieu thereof "the following conditions:";

(B) by striking out subparagraph (A); and

(C) by redesignating subparagraphs (B) and (C) as subparagraphs (A) and (B), respectively.

(b) Infringement Actions.--

(1) Registration as a prerequisite.--Section 411 is amended--

(A) by amending the section heading to read as follows:

"Sec. 411. Registration and infringement actions";

(B) in subsection (a) by striking out "Subject" and inserting in lieu thereof "Except for actions for infringement of copyright in Berne Convention works whose country of origin is not the United States, and subject"; and

(C) in subsection (b)(2) by inserting ", if required by subsection (a)," after "work".

(2) Table of sections.--The table of sections at the beginning of chapter 4 is amended by striking out the item relating to section 411 and inserting in lieu thereof the following:

"411. Registration and infringement actions.".

SEC. 10. COPYRIGHT INFRINGEMENT AND REMEDIES.

(a) Infringement.--Section 501(b) is amended by striking out "sections 205(d) and 411," and inserting in lieu thereof "section 411,".

(b) Damages and Profits.--Section 504(c) is amended--

(1) in paragraph (1)--

(A) by striking out "\$250", and inserting in lieu thereof "\$500"; and

(B) by striking out "\$10,000", and inserting in lieu thereof "\$20,000"; and

(2) in paragraph (2)--

(A) by striking out "\$50,000.", and inserting in lieu thereof "\$100,000."; and

(B) by striking out "\$100.", and inserting in lieu thereof "\$200.".

SEC. 11. COPYRIGHT ROYALTY TRIBUNAL.

Chapter 8 is amended--

(1) in section 801, by adding at the end of subsection (b) the following: "In determining whether a return to a copyright owner under section 116 is fair, appropriate weight shall be given to--

"(i) the rates previously determined by the Tribunal to provide a fair

return to the copyright owner, and

"(ii) the rates contained in any license negotiated pursuant to section 116A of this title."; and

(2) by amending section 804(a)(2)(C) to read as follows:

"(C)(i) In proceedings under section 801(b)(1) concerning the adjustment of royalty rates as provided in section 115, such petition may be filed in 1990 and in each subsequent tenth calendar year, and at any time within 1 year after negotiated licenses authorized by section 116A are terminated or expire and are not replaced by subsequent agreements.

"(ii) If negotiated licenses authorized by section 116A come into force so as to supersede previous determinations of the Tribunal, as provided in section 116A(d), but thereafter are terminated or expire and are not replaced by subsequent agreements, the Tribunal shall, upon petition of any party to such terminated or expired negotiated license agreement, promptly establish an interim royalty rate or rates for the public performance by means of a coin-operated phonorecord player of nondramatic musical works embodied in phonorecords which had been subject to the terminated or expired negotiated license agreement. Such interim royalty rate or rates shall be the same as the last such rate or rates and shall remain in force until the conclusion of proceedings to adjust the royalty rates applicable to such works, or until superseded by a new negotiated license agreement, as provided in section 116A(d).".

SEC. 12. WORKS IN THE PUBLIC DOMAIN.

Title 17, United States Code, as amended by this Act, does not provide copyright protection for any work that is in the public domain in the United States.

SEC. 13. EFFECTIVE DATE; EFFECT ON PENDING CASES.

(a) Effective Date.--This Act and the amendments made by this Act take effect on the date on which the Berne Convention (as defined in section 101 of title 17, United States Code) enters into force with respect to the United States.

(b) Effect on Pending Cases.--Any cause of action arising under title 17, United States Code, before the effective date of this Act shall be governed by the provisions of such title as in effect when the cause of action arose.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.
